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No. 97-719

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

GEORGE STUART, *et al.*,
Petitioners,

v.

AMERICAN EXPRESS TAX AND BUSINESS SERVICES, INC.
and STEPHEN M. MILLER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

The only question presented in this case is whether the district court and the Eleventh Circuit erred in their application of settled commercial speech principles when they concluded that Florida's prohibition of a certain class of CPAs from truthfully advertising their CPA status violated the First Amendment.

RULE 29.6 STATEMENT

American Express Tax and Business Services, Inc. is a wholly owned subsidiary of American Express Financial Corporation, which is a wholly owned subsidiary of American Express Company. American Express Tax and Business Services has one non-wholly owned subsidiary: ArakNet Communications, L.L.C.

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BRIEF IN OPPOSITION

Respondents American Express Tax and Business Services, Inc. ("American Express") and Stephen M. Miller respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's decision in this case.

STATEMENT OF THE CASE

In *Ibanez v. Florida Department of Business & Professional Regulation*, this Court stated that it could "not imagine how consumers can be misled by [a] truthful representation" that a person is a certified public accountant. 512 U.S. 136, 142 (1994). The State of Florida nevertheless continues to deny a certain class of CPAs—those who lawfully work for entities (such as American Express) that are not licensed CPA firms—the right to engage in this constitutionally protected expression. Under

Florida law, CPAs who work for licensed CPA firms (which by law must be 100 percent CPA-owned) may lawfully advertise their CPA status. CPAs employed by unlicensed firms such as American Express are forbidden from doing so, even though they may lawfully provide nonattest tax and business services in competition with licensed CPA firms. Respondents brought a First Amendment challenge to this restriction because they wished to provide consumers in Florida with truthful, objectively verifiable and valuable information about the qualifications of employees who work for American Express. Applying settled law, the district court granted respondents' motion for summary judgment, and the Eleventh Circuit affirmed in a well-reasoned opinion by Judge Black.

That decision does not warrant review by this Court. There is no conflict. The district court and the Eleventh Circuit did not fashion any new law. They simply applied settled commercial speech principles to the particular facts of the case. Both courts concluded that Florida's prohibition of certain licensed CPAs from truthfully advertising that fact violated the First Amendment. That ruling was plainly correct, and raises no issue of recurring or nationwide importance. Indeed, the national satndards setting bodies for the accounting profession—the National Association of State Boards of Accountancy and the American Institute of Certified Public Accountants—have recently promulgated a new Uniform Accountancy Act expressly endorsing the proposition that all CPAs (including those in unlicensed firms) should be able to truthfully advertise their CPA status.

1. The Facts.

Respondent Stephen M. Miller is the Managing Director of the Tampa office of American Express. He is a CPA in good standing licensed by the State of Florida, and a member of the American Institute of Certified Public Accountants ("AICPA"). He maintains an active license

and meets the continuing professional education requirements prescribed by the Florida Board of Accountancy ("Board"). As a result of the Florida laws challenged in this case, Miller refrained from truthfully informing consumers that he possesses the CPA credential, which hindered his ability to attract clients for the services his employer provides.[1]

American Express Tax and Business Services, Inc. is a separately incorporated subsidiary of American Express Company. Through regional offices in approximately 20 States, American Express provides tax, bookkeeping and accounting services to individual and small business clients. American Express competes primarily with regional and local accounting firms, individual CPAs, and non-CPA bookkeeping firms. American Express does not, however, attest to the accuracy or reliability of financial statements, or otherwise provide public guarantees as to the objectivity and reliability of corporate financial information.

2. Florida's Regulatory Scheme.

In Florida, licensed CPAs, when practicing as part of licensed CPA firms, are granted a statutory monopoly over the attest function. Florida law defines this function as "[a]ttest[ing] as an expert in accountancy to the reliability or fairness of presentation of financial information or utiliz[ing] any form of disclaimer of opinion which is intended or conventionally understood to convey an assurance of reliability as to matters not specifically disclaimed." Fla. Stat. Ann. § 473.322(c). The State reserves the attest function to licensees because it involves public reliance on a CPA's guarantee that a financial statement is objective and reliable. *See generally Edenfield v. Fane*, 507 U.S. 761, 768-69 (1993). In addition,

[1] Declaration of Stephen M. Miller in Support of Plaintiffs' Motion for Summary Judgment, July 26, 1995 (Record on Appeal ("R") 1-127-I).

CPAs provide nonattest services such as tax preparation and planning, bookkeeping, compiling financial statements (without expression of opinion), and consulting services. These tax and business services are *not* reserved exclusively to licensed CPAs or licensed CPA firms. Fla. Stat. Ann. § 473.322(c).

In Florida, CPAs working for a corporation such as American Express may not lawfully advertise their CPA credentials, even though they may lawfully provide nonattest tax and business services. This restriction on advertising results from the interaction of separate provisions of Florida's accountancy law. Sections 473.309 and 473.3101 require the licensure of any firm or partnership that "practices public accountancy," and restrict eligibility for such licenses to firms that are 100% CPA-owned. Section 473.302(5) defines "practicing public accountancy" as *either* (1) the performance of audit and attest services (and closely related services involving the expression of opinion on financial statements), § 473.302(5)(a), *or* the performance of other tax and business services by a person who also "holds out" out as a CPA. § 473.302 (5)(b). "Holding out" is defined as "advertising, as a part of a licensee's business activities, that the licensee is a certified public accountant." § 473.302(6). Thus, a CPA who performs only the tax and business services identified in § 473.302(5)(b) will not be "practicing public accountancy" so long as the CPA refrains from advertising the CPA credential. (R5-114-21 (stipulation)). That CPA's employer, in turn, will not need a separate firm license because § 473.309 only requires firm licenses when employees of the firm are "practicing public accountancy." As the Board interprets Florida law, however, if the individual CPA "holds out," then the licensing requirement of Sections 473.309 and 473.3101 is triggered, and the firm will need a separate license.

Because it is unlawful for a firm to "practice public accountancy" without a separate firm license, only CPAs in licensed firms may "hold out" as CPAs. CPAs em-

ployed by corporations or other unlicensed firms may lawfully provide nonattest accounting services, but they may not "hold out" because if they were to do so both they and their employer would be practicing public accounting without a firm license.

For CPAs employed by American Express, therefore, the *only* difference between lawful behavior and unlawful behavior is *holding out*. Likewise, for American Express itself, the only difference between lawful behavior (providing services for which no separate firm license is required) and unlawful behavior (providing services for which a license is required by §§ 473.309 and 473.3101) is advertising the fact that American Express employs CPAs.

This constitutes an insurmountable bar to holding out because American Express (like virtually every other publicly held corporation), cannot meet one eligibility require for firm licensure: 100% CPA ownership. Through the combination of the definiiton of "practicing public accountancy" (§ 473.302(5)(b)) and the firm licensure requirement (§§ 473.309, 473.3101), therefore, Florida prevents CPAs employed by American Express and other corporations from "holding out" as CPAs even though they and their corporate employers may lawfully provide consumers with all non-attest services without obtaining a firm license.

3. The District Court Proceedings.

In 1994, Respondents challenged this regulatory restriction as a violation of the First Amendment. After discovery, the parties cross-moved for summary judgment. The district court granted summary judgment for Miller but dismissed American Express for lack of standing.

The district court determined that Florida's ban on holding out by CPAs in unlicensed firms was subject to First Amendment scrutiny. Pet. App. 41a-43a. The court then held that the ban did not satisfy the applicable test

for restrictions on commercial speech for two reasons, each of which sufficed to invalidate the ban. First, the court held that the restriction did not materially advance either of the interests the Board posited as justifications—preventing deception and advancing professionalism. Pet. App. 48a-53a. Second, the court held that more narrowly tailored alternatives—such as additional disclosure—were available, and concluded that the holding out ban was "far more extensive than is necessary" and therefore violated the First Amendment. Pet. App. 53a-59a. Thus, the court enjoined enforcement of the provisions, as applied, to the extent they prevent licensed CPAs who are employed by unlicensed firms and who offer only non-attest business services from truthfully informing clients or prospective clients that they are CPAs. Pet. App. 61a.

4. The Court of Appeals Decision.

A unanimous Eleventh Circuit panel of Judges Black, Dubina and O'Kelley affirmed the district court's ruling that Florida's holding out ban violated the First Amendment.[2] The court rejected Petitioners' argument that Florida's holding out ban should be exempt from commercial speech scrutiny. After noting that "[t]he Supreme Court has already found that an actively licensed CPA's use of the CPA designation constitutes commercial speech," Pet. App. 8a, the appeals court held that Florida's restriction of that speech by CPAs such as respondent Miller is not "insulated from First Amendment review because it incorporates speech into a class of regulated activity it refers to as public accountancy." Pet. App. 10a. The court recognized that Miller's "holding out conveys significant information about his compliance with the education, competence and character requirements for a CPA license," and that such holding out "educate[s] the market

[2] The Eleventh Circuit reversed the district court's ruling that American Express lacked standing, and remanded for a determination whether American Express's First Amendment rights had been violated.

and stimulate[s] demand for his product or service." Pet. App. 10a-11a.

The court then proceeded to apply the settled commercial speech test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), and its progeny. The court first concluded that Miller's speech is not inherently misleading because it "conveys truthful information about his compliance with the requirements for obtaining a CPA license," and because none of the State's claims of consumer confusion were substantiated with any empirical evidence. Pet. App. 13a. The court then identified the substantial interests the state had posited in support of the restriction on holding out: "first, protecting consumers from unqualified accountants through maintenance of a professional and regulatory scheme over individual accountants and accounting firms, and the accounting services they provide," and second, ensuring the accuracy of commercial information disseminated to consumers." Pet. App. 13a-14a. The court did not reach the issue whether the State had met its burden of "demonstrat[ing] that the harms it recites are real and that its restriction will in fact alleviate them to a material degree," Pet. App. 12a (quoting *Edenfield v. Fane*, 507 U.S. at 770-71), because the court concluded that the State "had not carried its burden of demonstrating that its statutory scheme was narrowly tailored." Pet. App. 14a-15a. In particular, the appeals court affirmed the district court's holding that "a disclaimer or some other form of additional disclosure [would constitute] a narrower limitation that would allow plaintiff Miller to hold himself out as a CPA in a nonmisleading manner." Pet. App. 14a.

The court rejected Petitioners' argument that because it had the "greater" power to ban CPAs from providing any service while employed by unlicensed firms, it could constitutionally exercise the "lesser" option of allowing CPAs to provide tax and business services so long as they did not disclose the truthful fact of their CPA status. Pet.

App. 15a. As the court explained, "[t]he danger in accepting such an argument is that it would allow the state to use restrictions on commercial speech to shield its policies 'from the public scrutiny that more direct, nonspeech regulation would draw.'" Pet. App. 15a (quoting *44 Liquormart Inc. v. Rhode Island*, 116 S. Ct. 1495, 1511 (1996) (plurality opinion)). The court also rejected the State's argument that because it created the CPA title to begin with, it could suppress use of the title in certain circumstances in order to control the meaning the title would cary in the marketplace of ideas. Pet. App. 16a.

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied because this case involves nothing more than a straightforward application of settled First Amendment principles to a form of expression—"holding out" by CPAs—that this Court has already unanimously held is protected commercial speech. *See Ibanez v. Florida Dep't of Business and Professional Regulation*, 512 U.S. 136, 142 (1994) (the Florida Board "correctly acknowledged that Ibanez's use of the CPA designation [] was 'commercial speech'"). The Eleventh Circuit's decision in this case does not conflict with any decision of this Court or any court of appeals, and raises no issue of nationwide importance.

1. Review is unwarranted because Judge Black's opinion for the Eleventh Circuit panel correctly applied settled First Amendment law. Florida forbids duly licensed CPAs who work for unlicensed firms from communicating to consumers the truthful information that they possess the CPA license. This prohibition on "holding out" plainly "threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard." *Edenfield v. Fane*, 507 U.S. 761, 766 (1993).

a. It is settled that the "use of the CPA . . . designation" is "commercial speech" entitled to First Amendment

protection. *Ibanez*, 512 U.S. at 142. There is no dispute that Florida's regulatory scheme prohibits CPAs employed by non-CPA firms such as American Express from engaging in this form of commercial speech. The Eleventh Circuit thus found it a simple matter to conclude that the restriction had to pass muster under the appropraite First Amendment standard of review. That ruling is uncontroversial.

Florida's ban on "holding out" by CPAs employed in unlicensed firms is a direct—and not an incidental—restriction on speech. That is because it results *directly* from the State's decision to make "holding out" (which Florida law defines as "advertising") an element of the definition of "practicing public accountancy." When that definition intersects with the restrictions Florida has imposed on the types of firms that may "practice public accounting"—most importantly the 100% CPA ownership requirement of Section 473.309—the two statutory provisions together impose a direct prohibition on advertising. Insofar as nonattest accounting services are concerned, Florida's firm licensure requirement is not a limitation on *conduct* at all: all firms (whether or not CPA-owned and licensed) may lawfully provide those services. It is instead a limitation on speech: while a firm license is not necessary to provide nonattest services, only CPAs whose employers have a firm license may advertise their CPA credentials while performing these services.[3]

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[3] The Board itself interprets Florida law this way. Official Board opinion letters state that: "CPAs that are performing public accounting services can be employed by non-CPA firms but they cannot advertise that they are a CPA." (R5-118-b (Letter from Martha Willis to Agneta Boye, May 8, 1984 (ratified by the full Board May 10, 1984)); *see also* (American Express-127-Excerpts-IIx (Letter from Martha Willis to Craig Haverfield, December 18, 1984 (ratified by the full Board, January 21, 1985) (a "CPA can be an employee of a non-certified accounting firm . . . [but] he cannot hold himself out as a CPA and the firm cannot hold him out as a CPA").

The suppression is also intentional. Petitioners specifically argued in the court of appeals that "Florida's regulatory scheme is *designed* to prevent false and deceptive statements and conduct," [4] and Petitioners' expert witness conceded the same point.[5] Thus, the appeals court correctly rejected Petitioners' argument that the First Amendment does not apply: "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

b. The Eleventh Circuit's conclusion that the State had not met its burden of justifying the "holding out" restriction under the settled First Amendment commercial speech standards also rested on a correct application of settled law.

The "holding out" prohibition does not materially advance any interest posited by the State. "Holding out" conveys truthful, verifiable information about the CPA's qualifications and character. CPAs employed by American Express have passed the same examination, Fla. Stat. Ann. § 473.306; and have met the same good character requirements, §§ 473.306(2)(a), 473.306(4); the same education requirements, § 473.306(2)(b); and the same continuing education requirements, § 473.312, as CPAs employed in 100% CPA-owned, licensed firms. Thus, so long as a CPA employed in an unlicensed firm maintains a valid individual license, "holding out" is not even potentially misleading as to the CPA's background and qualifications.

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[4] Brief of Appellants Stuart et al., at 27 (emphasis added).

[5] *See* American Express-127-Excerpts-IId (Ponemon Dep. p. 188) (regulation is necessary "because consumers, for the most part, might have a difficult time distinguishing between the quality of the service provided and the CPA . . . [is] an imperfect signal because, clearly, you can have a CPA credential and not be a good quality provider of that service); *id.* (admitting that "the problem comes from the signaling by the CPA credential").

At the same time, "holding out" by CPAs in unlicensed firms does not convey any inherently misleading message about the degree of state regulation to which the CPA is subject. The Board failed to adduce any evidence that the prohibited "holding out" would mislead consumers into believing that CPAs in unlicensed firms are subject to a greater degree of state regulation than is the case.[6] CPAs in unlicensed firms are, in any event, subject to a very substantial degree of regulatory oversight. Indeed, the overwhelming majority of the provisions in Florida's accountancy laws and regulations apply to *all* CPAs, whether or not they are technically "practicing public accounting."[7]

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[6] The Board's expert, Mr. Louis Dooner, admitted that he was unaware of "any empirical evidence to justify [the] opinion that there is a risk of consumers being misled." *See* (American Express-127-I (Testimony of Louis Dooner, Nov. 22, 1994, p. 230)). The Board's other experts likewise admitted they knew of no empirical evidence that consumers will draw such conclusions if CPAs in the position of Respondent Miller hold out. (American Express-127-Excerts-11a (Holstrum Dep. at 123); American Express-127-Excerpts-IId (Ponemon Dep. at 126-127)). Nor did the Board introduce a single piece of anecdotal evidence showing that any consumer was ever actually misled in this way.

[7] The following subsections apply to *all* CPAs: 323(1)(a) (violation of any provision of the Act); 323(1)(b) (attempting to procure license by fraud or bribery); 323(1)(c) (revocation of license by another jurisdiction); 323(1)(d) conviction of crime which relates to the ability to practice public accounting); 323(1)(e) (making false reports, failing to make a required report, or inducing another to do so); 323(1)(f) (false or misleading advertising); 323(1)(h) (violation of *any* rule adopted by the Board); 323(1)(I) (practicing on an invalid license); 323(1)(j) (suspension of the right to practice before any state or federal agency); 323(1)(k) (performance of any fraudulent act while holding a license to practice public accounting; 323(1)(*l*) (failing to maintain a good moral character). The Board's experts conceded that the Board has jurisdiction to discipline all CPA's, not just those practicing public accounting, for any of these violations. (American Express-127-Excerpts-IId (Ponemon Dep. at 140-44)); (American Express-127-Excerpts-IIa (Holstrum Dep. at 66-70)). Other important statutory provisions—including the confidentiality requirement—likewise

The practice of American Express's CPAs is also subject to extensive federal regulatory oversight.[8] Indeed, the only substantive standards petitioners claim do not apply to CPAs employed by companies like American Express are the "technical standards" that regulate the quality of CPA service. But on their face those standards apply to all CPAs, not just those practicing public accounting in licensed firms.[9] Thus, the problem about which Petitioners complain would appear to be entirely of their own making.

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apply to all CPAs, not merely those "practicing public accounting," as the Board's expert conceded. (American Express-127-Excerpts-IIc (Dooner Dep. at 33)).

[8] The overwhelming majority of American Express's work involves tax practice. The Treasury Department comprehensively regulates CPAs who practice before the IRS. 31 CFR § 10.0 (1997) (hereafter "Circular 230"). *See Poole v. United States*, 84-2 USTC ¶ 9612 (1984). Circular 230 imposes substantial duties and restrictions on CPAs, including mandatory continuing education, § 10.6(e), prohibitions on contingent fees, § 10.28, and restrictions on conflicts of interest, § 10.29. *See also* § 10.21 (obligations to clients); § 10.23 (duties to IRS); § 10.31 (prohibition on taxpayer refund negotiation); § 10.33 (duties related to tax shelter opinions); and § 10.51 (list of acts of disreputable conduct justifying suspension or disbarment). The IRS has authority to discipline CPAs for incompetence or disreputable actions, for regulatory noncompliance, or for misleading a client with the intent to defraud. § 10.50. These regulations cover at least as much ground as Florida law. The typical Florida Board disciplinary action against a tax practitioner is for negligence. *See* American Express-127-Excerpts-IIb (Willis Dep. at pp. 131-32). The IRS enforces an identical requirement of due diligence under federal law. § 10.22. Similarly, federal law prohibits all CPAs from issuing any public communication that is false, fraudulent, unduly influencing, coercive, misleading, deceptive or containing an unfair statement or claim, § 10.30, just as CPAs are prohibited from false or misleading advertising under Fla. Admin. Code § 61H1-24.001.

[9] Fla. Admin. Code § 61H1-22.0086 (licensees performing tax services shall comply with AICPA Statement on Responsibilities in Tax Practice); Fla. Admin. Code § 61H-122.0085 (licensees performing management advisory services shall comply with AICPA Standards for Management Advisory Services).

If the "technical standards" were simply enforced as written they would apply to CPAs employed by American Express. Florida's failure to enforce the restrictions as written can hardly justify its effort to suppress truthful commercial speceh.

Nor dos a ban on holding out advance the State's asserted interest in enhancing professionalism. Whatever the virtues of a 100 percent CPA-ownership requirement in the abstract, Florida has not chosen to impose it as a condition of offering nonattest tax and business services of the kind American Express offers. Instead Florida denies CPAs who work for American Express the right to hold out while performing the tax and business services they may lawfully perform in an unlicensed firm. Because the restraint on speech does not directly advance the government's interest, it must fall irrespective of whether the regulatory scheme as a whole advances that interest.

Second, the Eleventh Circuit correctly concluded that the holding out prohibition was not narrowly tailored. Any hypothetical risk of misleading consumers could be fully eliminated by the simple expedient of *additional disclosure* of the fact that American Express is not a licensed CPA firm. It is well settled that "the preferred remedy is more disclosure, rather than less." *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977). "[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Central Hudson*, 447 U.S. at 565 (government may not "completely suppress information when narrower restrictions on expression would serve its interest[s] as well"). Alternatively, the Board could better protect consumers at less cost to free speech by simply regulating CPAs in unlicensed firms to the same degree it regulates other CPAs. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489-90 (1995); *44 Liquormart*, 116 S. Ct. at 1510.

2. There is no need for this Court to grant review to address the alleged conflict between the Eleventh Circuit's decision in this case and the Ninth Circuit's decision in *Johnson v. California State Bd. of Accountancy*, 72 F.3d 1427 (9th Cir. 1995). To begin with, the Ninth Circuit did not purport to issue a definitive ruling on any First Amendment question. *Johnson* involved an appeal of a district court decision denying a preliminary injunction. Although the Ninth Circuit held that the district court had not abused its discretion in denying preliminary relief, the panel expressly cautioned that it did "not reach the merits of the substantive determination of the free speech issue," and that its ruling "may provide little guidance as to the appropriate disposition on the merits." *Id.* at 1430 (quotation).

There is no genuine conflict in any event because the issue in *Johnson* was quite different from the issue presented in this case. *Johnson* did not involve a ban on holding out by CPAs in unlicensed firms. It involved a restriction on the acceptance of commissions by CPAs. Under California law, a CPA who is "practicing public accountancy" may not accept commissions. California Business and Professsional Code § 5061 (West 1990). Because California defines the practice of public accountancy as either providing attest services or providing non-attest services while also holding out as a CPA, in some circumstances CPAs would be subject to the commission ban if they held out but not if they declined to hold out. The appellant in *Johnson* argued that this regulatory structure burdened, and thereby discouraged, holding out because a CPA would have to forego commission-based compensation in order to hold out. But, as the Ninth Circuit panel was careful to note, the restriction on commissions did "not ban any commercial information"—it merely regulated remuneration. 72 F.3d at 1433. Thus, even if the Ninth Circuit's ruling is considered a holding that the First Amendment was not implicated in that case,

the decision is not truly in conflict with the Eleventh Circuit's decision because it would not control the outcome in the very different situation presented here.

Moreover, even if there were some tension between the reasoning in *Johnson* and the reasoning of the Eleventh Circuit in this case, review is not warranted. Petitioners are unable to point to any other decision of any court—federal or state—addressing similar issues. Any conflict in approach between the two decisions is tolerable, and this Court should await further litigating elucidation before deciding whether this issue needs to be addressed on the merits.

3. Petitioners are incorrect in their claim that the Eleventh Circuit's decision creates widespread uncertainty about the constitutionality of the regulatory structure governing accountancy in many States. In particular, there is no merit to Petitioners' assertion that the Eleventh Circuit's decision calls into question the constitutionality of the regulatory approach used by States which (like Florida and California) have adopted the Uniform Accountancy Act promulgated jointly by the American Institute of Certified Public Accountants (AICPA) and the National Association of State Boards of Accountancy. (NASBA). *See* Pet. at 11. The Eleventh Circuit did no more than affirm an injunction prohibiting Florida from applying its law in such a way as to prohibit CPAs in tax and business firms such as American Express from disseminating truthful information about their CPA status. That decision does not even remotely call into question the ability of States with laws like that of Florida to restrict the attest function to CPAs practicing in licensed firms, or to enforce any other restriction on CPA *conduct*.

The Eleventh Circuit's decision is not creating widespread uncertainty even on the narrow issue of "holding out" because the Uniform Accountancy Act is not generally interpreted to prohibit such expression by CPAs in unlicensed firms. Indeed, shortly after this Court rendered

its ruling in *Ibanez*, AICPA's General Counsel authored a memorandum explaining that the decision would have *no* impact on States following the Uniform Accountancy Act because the Act did not prohibit individual CPAs in unlicensed firms from holding out. The memorandum stated that the Uniform Act "does not prohibit an *individual* from advertising himself or herself as a CPA." The memorandum also stated that the Act permits "people holding certificates [to] hold themselves out, even while practicing in an unlicensed firm." [10] And the undisputed evidence submitted to the district court in this case confirmed that States following the Uniform Accountancy Act generally did not interpret their laws as prohibiting holding out by CPAs in unlicensed firms. *See* R-6-127-Excerpts-IIe (NASBA survey indicating that most States permitted CPAs in unlicensed firms to hold out).[11]

Moreover, earlier this year, AICPA and NASBA jointly decided to revise the Uniform Act to clarify that it permits CPAs in unlicensed firms to hold out. The official Report from the AICPA/NASBA Joint Committee on Regulation of the Profession states unequivocally that under the Uniform Accountancy Act "[a]ny duly licensed CPA can use his or her individual CPA title regardless of where they work." [12] It is therefore clear that under the Uniform

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[10] American Express-127-Excerpts-IIe.

[11] The district court record was replete with other examples of States that allowed CPAs in unlicensed firms to hold out. For example, Colorado reviewed an example of "holding out" by an American Express employee identical to that at issue here, and held that it did not violate Colorado law, which is modeled on the Uniform Accountancy Act. (American Express-127-II (Ernst Dec., Exh. B)). Similarly, Virginia's accountancy laws on their face permit individual CPAs to hold out while employed by nonCPA firms and providing nonattest accounting services. Va. Stat. § 54.1-2003. *See also* American Express-127-II (Ernst Decl. pp. 11-17 & Exhibits thereto) (identifying other state laws to the same effect).

[12] *Report from the AICPA/NASBA Joint Committee on Regulation of the Profession*, April 29, 1997, Questions and Answers, at 10 (copies have been lodged with the Clerk of the Court).

Accountancy Act—as it existed historically and in its present form—the commercial speech Florida sought to prohibit is entirely lawful. Thus, there is no serious prospect that the Eleventh Circuit's decision in this case will work any substantial change in law or regulatory practice outside the state of Florida.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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